

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,

No. C 01-0421 JL

Plaintiffs,

ORDER

v.

Granting Docket # 59

DONALD EVANS, et al.,

Defendants.

Plaintiffs' motion for an order for deadlines came on for hearing before this Court on September 24, 2003. The parties had briefed the issues extensively and the Court was prepared to rule. At the conclusion of the hearing the parties expressed willingness to collaborate on drafting a proposed order for the Court's signature, to be submitted to the Court by October 8, 2003. The deadline passed, and counsel presented the Court with Plaintiffs' Proposed Order, Defendants' Objections to Plaintiffs' Proposed Order and Plaintiffs' Response to Defendants' Objections on Proposed Order.

The parties present two versions of the Order:

Plaintiffs propose the following language: (Plaintiffs modified their Proposed Order in response to Defendants' Objections - this is the modified version)

1 “This matter is before the Court on plaintiffs’ motion for deadline to prepare
2 rebuilding plans. Having considered the parties’ arguments presented in writing and
3 at the September 24 hearing, the Court hereby rules as follows:

4 Plaintiffs’ motion is GRANTED. Consistent with the Magnuson-Stevens Act,
5 Defendants shall: (1) Approve rebuilding plans for darkblotched rockfish, canary
6 rockfish, lingcod and Pacific Ocean Perch by January 31, 2004; (2) Prepare, or
7 cause to be prepared, rebuilding plans for bocaccio rockfish, cowcod, yelloweye
8 rockfish, and widow rockfish by April 15, 2004; (3) Approve or adopt rebuilding plans
9 for bocaccio rockfish, cowcod, yelloweye rockfish, and widow rockfish by September
10 15, 2004; and (4) Approve or adopt a rebuilding plan for Pacific whiting by November
11 30, 2004.

12 IT IS SO ORDERED.” (Plaintiffs’ Response at page 5, n.4)

13 *Defendants propose the following language:*

14 “This matter is before the Court on Plaintiffs’ Motion for Deadline to prepare
15 rebuilding plans for overfished Pacific groundfish species. Having considered the
16 Parties’ arguments presented in writing and at the September 24 hearing, the Court
17 hereby rules as follows:

18 Plaintiffs’ Motion is GRANTED.

19 Defendants shall take action pursuant to Section 304(a)(3) of the Magnuson-
20 Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) on
21 rebuilding amendments for darkblotched rockfish, canary rockfish, lingcod, and
22 Pacific Ocean perch by January 31, 1004.

23 Either the Pacific Fisheries Management Council or the National Marine
24 Fisheries Services shall prepare rebuilding amendments for bocaccio rockfish,
25 cowcod, yelloweye rockfish and widow rockfish by April 15, 2004. Defendants shall
26 take action on these rebuilding amendments pursuant to either section 304(a)(3) or
27 section 304(c) of the Magnuson-Stevens Act by September 15, 2004.
28

Defendants shall take action under either section 304(a)(3) or section 304(c) of the Magnuson-Stevens Act on a rebuilding amendment for Pacific whiting by November 30, 2004.

IT IS SO ORDERED.” (Defendants’ Objections at page 3)

The parties’ proposed orders differ significantly. Defendants propose to “take action” on “rebuilding amendments” versus “prepare, cause to be prepared” and “approve or adopt” “rebuilding plans.” This is inconsistent with what the Court and the parties discussed at the hearing. “Taking action” is so vague as to be meaningless. The statute requires that the rebuilding plans be completed and ready for implementation within a certain time frame, which is long past.

The Court also notes that Defendants in their Proposed Order expressly provide for participation by the Pacific Fisheries Management Council (“the Council”) in the preparation and completion of the rebuilding plans. The Court finds that such participation is likely to contribute to significant additional delay, when Defendants are already out of compliance with the Congressionally-mandated deadlines. Accordingly, the NMFS alone should prepare and complete the rebuilding plans.

LEGAL ANALYSIS

The Statute Has a Deadline, which is Past

The deadline to prepare a rebuilding plan for the nine overfished species has passed. 16 U.S.C. §1854(e)(3) of the Magnuson-Stevens Act (“MSA”) requires that rebuilding plans be completed for overfished species within one year of their being identified as overfished. Some of the species were identified in March 1999 (bocaccio, lingcod and Pacific ocean perch, (“POP”), others in January 2000 (canary rockfish and cowcod), others in January 2001 (darkblotched rockfish and widow rockfish). None of these species has a rebuilding plan yet. In the meantime, two more overfished species have been identified, yelloweye rockfish (January 2002) and Pacific whiting (April 2002). *Natural Resources Defense Council v. Evans*, 243 F.Supp.2d 1046, 1054 -1055 (N.D.Cal. 2003)

1 Where the Secretary has so designated a fishery, measures must be taken to
2 rebuild to a level consistent with producing the maximum sustainable yield (MSY), or
3 suitable proxy, within a time period as short as possible but not exceeding ten (10) years.
4 See 16 U.S.C. §§ 1802(28)(C), 1802(29), 1854(4), 1853(10).

5 In the case at bar, for the nine overfished species, there is not one completed
6 rebuilding plan, despite the passage of the statutory deadline. The Court finds this delay
7 unreasonable.

8 **NMFS Pleads Other Work and Insufficient Staff**

9 NMFS cites other work as interfering with its compliance with the Court's order to
10 prepare the rebuilding plans: *inter alia*, participation in and support of the September,
11 November and March meetings of the Pacific Council, meetings of the Council's Groundfish
12 Management Team, Allocation Committee, and Open Access Permitting Committee, and
13 the interim and annual meetings of the International Pacific Halibut Commission (IPHC);
14 inseason management of the four commercial Pacific whiting fisheries, inseason
15 management of the seven recreational and three non-tribal commercial Pacific halibut
16 fisheries; preparation and publication of inseason groundfish management measures likely
17 to be developed at the September and November 2003 Council meetings; preparation of
18 initial scoping documents for a license limitation program for the open access groundfish
19 fisheries; reviewing and processing the DEIS and FEIS for the 2004 groundfish
20 specifications and management measures, and other duties that will inevitably arise (de
21 Reynier Decl. at ¶12 and Table 2).

22 The Court, on examining pages 9 and 10 of the de Reynier Declaration, sees many
23 steps in the process which could be eliminated - - relating to the "workload" issues. The
24 Court could order elimination of the "scoping" hearings, in fact, elimination of the Council
25 entirely would greatly speed the proceedings.

26 In addition to eliminating the Council from the process, NMFS has the option of
27 diverting staff and resources or using outside contractors. A former NMFS official testified
28 that the agency frequently shifts staff, resources and priorities to meet court-ordered

1 deadlines. (Decl. Of Heather Weiner, Ex. I to Pltf. Reply at ¶6). NMFS effectively concedes
2 this point when it admits that at least one EIS currently is being prepared by an outside
3 contractor (de Reynier Decl. at p. 11 - - Programmatic Bycatch EIS “is being prepared and
4 managed by a NMFS contractor”).

5 In fact, in listing other work that might suffer were NMFS to divert resources on
6 orders from this Court, Mr. Robinson describes some of the important tasks as “court-
7 ordered.” Plaintiffs reject this as an excuse. Congress has already decided that rebuilding
8 plans are the highest of priorities, by mandating procedures and deadlines. Where
9 “Congress has established a clear time frame for regulatory action, deferring to the agency
10 [as to an alternative time frame] is inappropriate.” *Sierra Club v. Thomas*, 658 F.Supp. 165,
11 171, n.6 (N.D.Cal. 1987).

12 **NMFS Would Not Have to Start from Scratch**

13 Plaintiffs deny that NMFS is starting from scratch on the bocaccio or any other
14 rebuilding plans. Plaintiffs point out that the NEPA and other analytic processes do not
15 necessarily happen one after another, but can proceed simultaneously and parallel with
16 preparation of the rebuilding plans. NMFS lists the MSA process and then states that
17 “NEPA requires a separate process.” (¶ 4 and 5 of Def. Opp.) In fact, NMFS neglects to
18 mention that it had already performed many tasks for the rebuilding plans which will not
19 have to be repeated: specifically the NEPA procedures, including publishing a notice of
20 intent to prepare an EIS, and the scoping process.

21 NMFS has published two separate notices of intent to prepare a rebuilding plan EIS
22 in April 2002 and in March 2003. Scoping has been underway since March 1999, when the
23 first three species were identified as overfished. 67 Fed. Reg. at 18,577. The second notice
24 convened a scoping meeting April 6, 2003. 68 Fed. Reg. at 12,889. One of the notices
25 acknowledges that the rebuilding plans have “already been subject to a lengthy
26 development process that has included early and meaningful opportunity for public
27 participation. . .”. 67 Fed. Reg. at 18,577. NMFS is not starting from scratch.
28

1 In fact, NMFS is re-using the language from existing draft rebuilding plans in the new
2 rebuilding plans. (See. Plaintiffs' Reply at Ex. D - - excerpts from the EIS on the 2003
3 Pacific groundfish specifications and Ex. E - - excerpts from the draft EIS on the first batch
4 of Pacific groundfish rebuilding plans. The sections labeled "West Coast Marine
5 Ecosystems" in each document (section 3.1.1 (pages 3-1 to 3-3) in Ex. D, and sections
6 3.1.2 (page 3-3 to 3-5) in Exhibit E, are virtually word-for-word identical. There are other
7 examples. NMFS cannot claim that it had to scrap all previous documents and start over. In
8 fact, in Ex. D, at 4-61, NMFS admits that:

9 "Overfished species are currently managed under interim rebuilding plans, and it is
10 not expected that final rebuilding plans will differ substantially, taking into account
11 any changes that would be made to either type of plan as a result of new data on
12 overfished stocks' parameters." (Ex. D, at 4-61)

13 **New Scientific Data No Excuse for Delay**

14 **Current Specifications Not Adequate to Protect Fishery**

15 Also, NMFS receipt of new scientific data is not an excuse for delay. Plaintiffs'
16 expert, fishery biologist Dr. Mark Powell, explains in his second declaration (Ex. F to
17 Plaintiffs' Reply) that "fishery management is always a moving target" because "[t]here is
18 always new scientific data being compiled." (Second Powell Decl., Ex. F to Pltf. Reply at
19 ¶16). In fact, the MSA requires NMFS to review and revise its rebuilding plans as
20 necessary every two years. 16 U.S.C. §1854(e)(7). Dr. Powell attests that NMFS currently
21 "has sufficient data in its possession about the overfished species to prepare rebuilding
22 plans without further delay." Powell Decl at ¶16.

23 NMFS contends that it is already managing the fishery under interim plans and that
24 its management is adequate to protect the overfished species. It identifies three top
25 management priorities: preventing overfishing, rebuilding overfished stocks, and minimizing
26 incidental bycatch and discard of overfished and depleted stocks. 67 Fed. Reg. 10490,
27 1573 (March 7, 2002); 68 Fed. Reg. 11182 (March 7, 2003).

1 NMFS believes that Plaintiffs are ignoring unprecedented measures it has taken,
2 some of which have severe effects on the fishing community. See 68 Fed. Reg. 936, 961
3 (January 7, 2003). These include: depth-based fishery closures instituted in September
4 2002 to protect darkblotched rockfish, 67 Fed. Reg. 57973-57981 (September 13, 2002);
5 depth-based management in 2003, with large closed areas that prevent vessels from
6 operating in areas where overfished species are commonly found, 68 Fed. Reg. 936
7 (January 7, 2003); and management of Pacific whiting under the 40-10 harvest control rule,
8 expected to achieve rebuilding within ten years. (De Reynier Decl. At ¶14). These actions
9 represent progress but are no substitute for rebuilding plans for all nine overfished species.

10 The Regional Administrator, Mr. Robinson, discounts the testimony of Plaintiffs'
11 expert, Dr. Powell, who says that bycatch and habitat damage are the main reasons that
12 groundfish stocks have become overfished. Mr. Robinson says he is "unaware of any
13 documented scientific studies on the West Coast that have demonstrated this conclusion
14 relative to habitat damage." He does not claim to be unaware of any studies documenting
15 the damage related to bycatch. 2d Supp. Robinson Decl. At ¶21.

16 Both Plaintiffs and the Court find Dr. Powell, a PhD biologist, far more persuasive on
17 the question of priorities than Mr. Robinson, a non-scientist who holds bachelor's degrees.
18 (Powell Decl., Ex. C to Pltf Motion ¶2; Robinson Decl., Ex. 1 to Def. Opp. To Pltf Mot. For
19 Order on Remedy, filed Oct. 31, 2002 ¶2). Dr. Powell's views are set forth below as to why
20 the current measures are inadequate and why rebuilding plans are necessary for the
21 recovery of the fishery.

22 **The Current NMFS Schedule is Flawed, both Scientifically and Legally**
23 **Congress Foresaw Council as Source of Delay**

24 Plaintiffs claim that NMFS is wrong, both scientifically and legally, when it describes
25 the current schedule as adequate to implement rebuilding of the fisheries.

26 **Scientific Flaws**

27 Plaintiffs present the declaration of fishery biologist Dr. Mark Powell, who is deeply
28 familiar with the Pacific groundfish fishery. In his First Declaration, at Ex. C to Plaintiffs'
Motion, Dr. Powell explained why delays in the rebuilding plans put overfished species at a

1 disadvantage and decrease the odds of successfully rebuilding the species in the shortest
2 possible time. In his Second Declaration, at Ex. F to Plaintiffs' Reply, Dr. Powell observes
3 that "[s]everal of the overfished Pacific groundfish species are very badly overfished.
4 Bocaccio, for example, is at less than 10% of its unfished population level, which is a very
5 serious population decline. Cowcod, another Pacific groundfish species, is so badly
6 overfished that NMFS estimates it will take nearly 100 years to rebuild the species." *Id.* at
7 ¶5.

8 While NMFS believes the interim measures it is taking now are adequate to protect
9 the fishery, Dr. Powell disagrees and explains why. Although he concedes that some
10 measures benefit the overfished species, most of them "do not go far enough to give the
11 overfished species the protection they need" and "NMFS is wrong to claim that these
12 protections are adequate." *Id.* at ¶6.

13 Specifically, the annual specifications are inadequate substitutes for rebuilding
14 plans, because they are "a unique recovery map for an overfished species" that provide "a
15 comprehensive analysis of all the reasons why [the species] is overfished and a
16 comprehensive plan for addressing those causes so the species can rebuild." *Id.* at ¶9,8.

17 In fact, according to Dr. Powell, the annual specifications can subtly undermine
18 progress in rebuilding the overfished species, because it "is typically an ad hoc creation of
19 management measures that are hoped to achieve a target [fishing] catch level." *Id.*, ¶10.
20 These measures are "a hodgepodge of regulatory protections with little coordination and
21 little analysis that determines whether the overall harm caused by fishing (including habitat
22 damage and juvenile bycatch) is being corrected adequately to allow rebuilding." *Id.* at ¶ 7,
23 12.

24 The existing rebuilding analyses also fail to substitute for rebuilding plans, because
25 "they do not set out the affirmative protections that the species need in order to rebuild as
26 quickly as possible," such as describing "what kinds of bycatch and habitat protections an
27 overfished species needs in order to rebuild." *Id.* at ¶14.

28

1 In addition, NMFS fails to enforce even the interim specifications it purports to have
2 in place. In recent years, several “critically overfished species,” including bocaccio, have
3 been harvested by fishermen at levels higher than permitted by NMFS’ annual specification.
4 *Id.* ¶15. NMFS apologizes and says that it has learned from this experience and redesigned
5 its sampling and survey methods in order to do a better job of keeping the annual catch
6 within its optimal yield (OY).

7 Plaintiffs see a logical conflict within the NMFS position. It argues on the one hand
8 that it is doing everything that rebuilding plans could do. At the same time, it argues that it
9 would be very onerous and time consuming to prepare rebuilding plans.

10 Either the rebuilding plans are already effectively in place, in which case all NMFS
11 needs to do is formalize them, or there is much work to be done to develop rebuilding plans
12 for the overfished species, in which case NMFS cannot claim to be doing everything it
13 could.

14 Legal Flaws

15 Congress mandated a schedule for preparing and completing a rebuilding plan. See
16 16 U.S.C. §1854(e)(5). NMFS cannot rewrite the statute because it feels it is doing the best
17 it can. Congress considered rebuilding plans important enough to include a mandatory
18 schedule. Congress also foresaw an inherent potential for delay in the Council process, so
19 it built in a mechanism for NMFS to take over if the Council couldn’t complete a plan on
20 time.

21 Congress Foresaw Councils as a Source of Delay

22 There is evidence in the legislative history of the MSA that Congress understood that
23 the Councils could be a source of delay and accordingly provided that where a Council fails
24 to prepare and complete a rebuilding plan in the statutorily mandated time period, the
25 NMFS itself should take over and complete the plan within the mandated time:

26 “Significantly, Congress imposed the one-year time limit on fishery councils because
27 of the perceived inability of fishery councils to quickly enact needed conservation
28 measures. Indeed, Congress recognized that ‘it actually took a lawsuit by two

Massachusetts environmental groups to force the notoriously slow New England Fishery Management Council to draft and implement a fishery management plan that contained the teeth needed to stem continued overfishing and stock decimation.’ See 142 Cong.Rec. S10906, 10910 (September 19, 1996) (statement of Sen. Chafee).” *A.M.L. Intern., Inc. v. Daley* 107 F.Supp.2d 90, 94 (D.Mass.,2000)

Plaintiffs quote Senator Stevens, the lead sponsor of the 1996 MSA: “If the fisheries management councils have allowed a fishery to become overfished, we want it to be stopped immediately.” 142 Cong. Rec. S10810 (daily ed. Sept. 18, 1996) (statement of Sen. Stevens).

Senator Kerry, the bill’s lead Democratic sponsor and co-floor-manager, made the same point when he stated: “We are precariously close to fisheries failure in many of our most commercially important fish stocks, and it is imperative that we take immediate action if we are to avert disasters such as the one that we are currently experiencing . . . off the waters of New England.” *Id.* at S10812 (statement of Sen. Kerry).

Conclusion and Order

For all the above reasons, Plaintiffs’ motion for deadline on rebuilding plans is GRANTED.

The Secretary is hereby given authority to prepare or cause to be prepared and approve or adopt rebuilding plans for the species listed in this order pursuant to 16 U.S.C. §1854 (c)(1)(C) of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”).

NMFS shall approve rebuilding plans pursuant to 16 U.S.C. §1854 (c) for darkblotched rockfish, canary rockfish, lingcod, and Pacific Ocean perch by January 31, 2004.

NMFS shall prepare or cause to be prepared rebuilding plans for bocaccio rockfish, cowcod, yelloweye rockfish and widow rockfish by April 15, 2004. Defendants shall approve or adopt rebuilding plans for these species pursuant to 16 U.S.C. §1854 (c) of the Magnuson-Stevens Act by September 15, 2004.

NMFS shall approve or adopt a rebuilding plan pursuant to 16 U.S.C. §1854 (c) of the Magnuson-Stevens Act for Pacific whiting by November 30, 2004.

IT IS SO ORDERED.

DATED: October 2003

James Larson
United States Magistrate Judge

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